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No.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, ET AL., PETITIONERS

*v.*

WESTERN NUCLEAR, INC., ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

CHARLES FRIED
*Solicitor General*

RICHARD K. WILLARD
*Assistant Attorney General*

THOMAS W. MERRILL
*Deputy Solicitor General*

JOHN HARRISON
*Assistant to the Solicitor General*

LEONARD SCHAITMAN
RICHARD A. OLDERMAN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Under Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. 2201(v)), the Department of Energy (DOE) sells uranium enrichment services to electric utilities that need enriched uranium as reactor fuel. Section 2201(v) provides that DOE shall restrict its enrichment of foreign-source uranium for domestic use "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The Department of Energy has determined that the domestic uranium industry is not viable and that the imposition of restrictions on the enrichment of foreign uranium would not make it viable.

The question is whether Section 2201(v) requires the Department of Energy to restrict enrichment of foreign uranium whenever the domestic uranium is not viable, whether or not the imposition of such restrictions would make the domestic industry viable.

## PARTIES TO THE PROCEEDING

The petitioners are John S. Herrington, the Secretary of Energy, and F. Clark Huffman, Sherry E. Peske, Philip G. Sewell, James W. Vaughn and Joseph F. Salgado, all of whom are officers or employees of the Department of Energy sued in their official capacities, and the United States Department of Energy.

The respondents are Western Nuclear, Inc., Energy Fuels, Inc., and Uranium Resources, Inc.

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The Solicitor General, on behalf of the Department of Energy, the Secretary of Energy, and officers and employees of the Department of Energy sued in their official capacities, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 825 F.2d 1430. The order of the district court (App., *infra*, 22a-24a) is unreported.

## JURISDICTION

The decision of the court of appeals (App., *infra*, 1a) was entered on July 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

## STATUTORY PROVISION INVOLVED

Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. 2201(v)) provides:

Contracts for production or enrichment of special nuclear material; domestic licensees; other nations; prices; materials of foreign origin; criteria for availability of services under this subsection; Congressional review

[In the performance of its function the Commission is authorized to]

(A) enter into contracts with persons licensed under Section 2073, 2093, 2133 or 2134 of this title for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission; and

(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to Section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection:

*Provided,* That (i) prices for services under paragraph (A) of this subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further,* That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the



jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided,* That before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

## STATEMENT

This case presents a question of statutory interpretation of great practical importance. Section 161v of the Atomic Energy Act of 1954, 42 U.S.C. 2201(v) (Section 2201(v)), requires the Department of Energy (DOE) to restrict its provision of enrichment services for foreign uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The Secretary has determined that the domestic uranium industry is not viable, and that there is *no* level of reduced enrichment services for foreign uranium that would make it viable. Consequently, the Secretary has interpreted Section 2201(v) as not requiring—or authorizing—any restriction on enrichment of foreign uranium. The lower courts disagreed, holding that once the Secretary finds that the domestic uranium industry is not viable, he must automatically terminate the

provision of *all* enrichment services to foreign uranium, even if this will do nothing to revive the domestic industry.

1. a. The principal civilian use of uranium is as fuel for nuclear reactors operated by electric utilities. Because natural uranium does not contain enough of the highly fissionable isotope U-235 to serve as reactor fuel, it must undergo a process known as enrichment. The enrichment process for commercial reactor fuel increases uranium's U-235 content from approximately 1% to approximately 3%. App., *infra*, 4a.

Under the Atomic Energy Act of 1954 (ch. 1073, § 158, 68 Stat. 948 (42 U.S.C. 2188)) as originally adopted, the Atomic Energy Commission (AEC) was given a monopoly over the ownership of special nuclear materials, including enriched uranium.[1] Utilities operating commercial reactors thus were required to lease their fuel from the AEC. App., *infra*, 3a. In 1964, Congress eliminated this government monopoly on ownership of nuclear fuel. The Private Ownership of Special Nuclear Materials Act (the Private Ownership Act) (Pub. L. No. 88-489, 78 Stat. 602) authorized non-governmental persons to own reactor fuel, subject to strict licensing requirements and regulatory controls. The Private Ownership Act did not, however, eliminate the government's de facto monopoly in the provision of enrichment services (§ 16, 78 Stat. 606; see S. Rep. 1325, 88th Cong., 2d Sess. 2 (1966) [hereinafter Private Ownership Act Report]). Within the United States, the provision of enrichment services remains exclusively in the hands of the federal government (App., *infra*, 4a).

When the Private Ownership Act was passed, imports of uranium were insignificant. But both the AEC and the

[1] "Special nuclear material" is defined in 42 U.S.C. 2014(aa) and includes plutonium and enriched uranium. The term "source material" includes unenriched uranium or thorium (42 U.S.C. 2014(z)).



Joint Committee on Atomic Energy were concerned that imports might someday displace the domestic uranium industry, and that this could have a detrimental effect on the nation's energy and national security needs (Private Ownership Act Report 30). Accordingly, the Private Ownership Act included a proviso requiring the AEC to restrict enrichment of foreign-source uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry" (42 U.S.C. 2201(v)).

No foreign uranium was enriched for domestic use in the early years of the AEC's enrichment services program (see 31 Fed. Reg. 16479 (1966) (initial criteria providing that foreign-source uranium would not be enriched for domestic use)). However, during the 1970's, the AEC studied the advisibility of phasing out these restrictions. In 1974, after soliciting comments on such a proposal (38 Fed. Reg. 32595 (1973)), the AEC amended its enrichment services criteria by establishing a schedule under which by 1984 all restrictions on enriching imported uranium would be eliminated (39 Fed. Reg. 38016 (1974)). The criteria permitting the enrichment of foreign uranium were reported to Congress pursuant to Section 2201(v) and Congress took no adverse action. The scheduled phase-out of restrictions took place as planned, and DOE has not since reimposed any restrictions on enrichment of foreign uranium.[2]

b. In the late 1970's and early 1980's, the position of the domestic uranium industry deteriorated rapidly and dramatically (App., *infra*, 5a). As one report put it, the industry suffered "a collapse that by industrial standards

[2] The AEC was abolished in 1974 (Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 104(a), 88 Stat. 1237). Its "licensing and related regulatory functions" were transferred to the Nuclear Regulatory Commission (NRC) (§ 201(f), 88 Stat. 1243). All other AEC functions were transferred to the Energy Research and Development agency, the predecessor of the Department of Energy (DOE) (§ 104(c), 88 Stat. 1237).

occurred practically overnight" (Blundell, *U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction*, Wall St. J., June 12, 1985, at 1). The main cause of this development was "a classic oversupply situation," brought about by a combination of excess capacity and reduced demand (*Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearing Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 15 (1981) (statement of Shelby Brewer, Assistant Secretary of Energy for Nuclear Energy) [hereinafter *1981 Hearing*]). On the one hand, exploration and other investment increased significantly in the 1970's, in response to optimistic projections of future demand (*id.* at 19-20 (charts 2, 3, 4, showing peak and decline of exploration, employment, and capital expenditures)). But just as supply was increasing, developments threatening the economic feasibility of nuclear power generation, followed by heightened concerns over reactor safety triggered by the Three Mile Island incident, led to a wave of "reactor delays and cancellations, and [a] lack of new reactor orders" (*id.* at 12).

The result was a precipitous decline in the price of uranium ore. In 1981, the Edison Electric Institute, a utility trade association, reported that the spot market price of uranium had declined from $43.25 per pound in 1979 to $23.50 per pound (*1981 Hearing* 148 (statement of Edison Electric Institute)). By 1984, the spot market price had fallen to $15.50 per pound, which the industry informed DOE was less than one-half the conventional United States producers' average cost of production (51 Fed. Reg. 27132, 27136 n.12 (1986)). The spot market price has not recovered appreciably since then.[3]

[3] The current spot market price was $16.65 per pound on August 31, 1987 (NUEXCO Monthly Report No. 229, at 34 (Sept. 1987)).



Two other important developments contributed to the decline of the domestic uranium industry during this period. First, the United States lost its monopoly as the only provider of enrichment services for commercial nuclear reactors. Beginning in the mid-1970's, two european consortia and the Soviet Union began to supply foreign nuclear facilities with enriched uranium, produced largely from foreign-source ore (51 Fed. Reg. 3624, 3625, 3627 (1986)). By the 1980's, enriched uranium from foreign sources also was being imported into the United States, reaching a level of 4.9% of total requirements in 1984 (Energy Info. Admin., Dep't of Energy, *Domestic Uranium Mining and Milling Industry: 1985 Viability Assessment* xii (1986) [hereinafter *1985 Viability Assessment*]). Indeed, DOE suddenly found that it had become the highest priced supplier of enrichment services for commercial reactors, charging $138 per separative work unit (SWU)[4] in 1984, whereas its foreign competitors were charging $105-$115 per SWU (51 Fed. Reg. 3625 & n.2 (1986)). "As a result, DOE's foreign competitors * * * captured about 60 percent of the total foreign market and * * * made significant inroads into the domestic markets" (*id.* at 3625).

Second, as part of the same imbalance of supply and demand that crippled the domestic uranium industry, many utilities found themselves committed to long-term contracts to purchase enrichment services that they no longer needed. DOE has estimated that these commitments gave rise to a surplus of enriched uranium amounting to about

[4] A SWU is a measure of the production capacity of uranium enrichment plants and hence a unit in which enrichment services can be measured (51 Fed. Reg. 3625 & n.1 (1986)). SWU's "measure the amount of effort expended to separate a given amount of natural uranium into two components – one having a higher concentration of fissionable uranium-235" (*id.* at 3625 n.1).

39 million SWU's by 1984. This in turn "led to the emergence of a secondary market in which utilities have been willing to sell their surplus SWU's to other utilities at discounts of $30 per SWU and more" (51 Fed. Reg. 3625 (1986)).

DOE sought to deal with the crisis in the domestic uranium industry in different ways. In an effort to stimulate demand, the Department continued to promote the expanded use of commercial nuclear energy (see *1981 Hearing* 12-13). And in an attempt to minimize the market's perception of oversupply, DOE stated that it would not draw down or sell off the considerable stockpile of uranium under its control (*e.g., id.* at 13). But the Department has no statutory authority to regulate either the importation of *enriched* uranium, or the secondary market in *enriched* uranium. Both of these sources, which offer direct competitive substitutes for the product of the domestic uranium industry, are subject to the exclusive oversight of the Nuclear Regulatory Commission (NRC).[5] The only other regulatory tool available to DOE is Section 2201(v), but the Department has consistently concluded that any effort to restrict the provision of enrichment services to foreign uranium would be at best futile, and at worst counterproductive. (See pages 8-12, *infra.*).

c. In 1981 Congress conducted hearings on the problems of the domestic uranium industry (see *1981 Hearing*). DOE's representative testified that "[a]lthough there have been cutbacks in exploration and production and thus in employment, foreign uranium, we feel, has not been the

[5] The AEC's authority to license the domestic sale or the importation of special nuclear material (see 42 U.S.C. 2073(a)) is now vested in the NRC. The NRC is required to deny any such license that "would be inimical to the common defense and security or the health and safety of the public" (42 U.S.C. 2099). Any authority under the Atomic Energy Act to restrict sales of enriched uranium on the secondary market or uranium imports would have to derive from that provision.



central cause of this problem" (*id.* at 12). Indeed, imports at that time were not a major factor in the market, accounting for only 10% of deliveries in 1980 (*id.* at 16).[6] Assistant Secretary Brewer therefore testified that DOE did not believe there was any need to change the planned phase-out of enrichment restrictions the AEC had adopted in 1974 (*id.* at 18).

In 1982, Congress again dealt with the issue of uranium imports, this time while considering the reauthorization of the Nuclear Regulatory Commission. Significantly, Congress rejected a proposal that would have required DOE, when uranium imports reached a level of 37.5%, to revise its enrichment criteria "so as to encourage the use of domestic origin uranium in domestic nuclear powerplants" (128 Cong. Rec. S13054 (daily ed. Oct. 1, 1982)). Instead, Congress enacted a new measure, codified at 42 U.S.C. 2210b, that set forth a series of reporting requirements to ensure that Congress could monitor the condition of the domestic industry, and that already-existing trade and national security statutes would be enforced with respect to uranium imports. Specifically, Section 2210b required the Secretary to promulgate criteria for assessing the viability of the domestic uranium industry, set forth eight statutory criteria that the Secretary was to consider in making such a determination,[7] and directed the Secretary to submit

[6] Imports have been at higher levels in succeeding years. "Natural (unenriched) uranium imports in 1982, 1983, 1984, and 1985 represented, respectively, 51.7, 25.9, 39.2 and 34.4 percent of U.S. requirements" (*1985 Viability Assessment* at xii).

[7] The statute (42 U.S.C. 2210b(c)) provides:

**Criteria for monitoring and reporting requirements**

The criteria referred to in subsection (a) of this section shall also include, but not be limited to—

(1) an assessment of whether executed contracts or options for source material or special nuclear material will result in greater that 37½ percent of actual or projected domestic

annual reports on the viability of the domestic uranium industry to both the President and the Congress.

Pursuant to Section 2210b, the Secretary issued criteria for determining the viability of the domestic uranium industry (10 C.F.R. Pt. 761). Elaborating on the factors specified by Congress, the Secretary defined viability primarily in terms of "the extent to which the domestic mining and milling uranium industry will be capable, at any particular time, of supplying the needs of the domestic nuclear power industry under a variety of hypothetical conditions" (48 Fed. Reg. 45747 (1983)). Although the financial condition of the domestic uranium industry was one criterion to be examined, the Secretary made it clear that this was not the end of the inquiry. Instead, the focus was on the capacity of the domestic industry to supply domestic generating facilities in the event of various

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uranium requirements for any two-consecutive-year period being supplied by source material or special nuclear material from foreign sources;

(2) projections of uranium requirements and inventories of domestic utilities for a 10 year period;

(3) present and probable future use of the domestic market by foreign imports;

(4) whether domestic economic reserves can supply all future needs for a future 10 year period;

(5) present and projected domestic uranium exploration expenditures and plans;

(6) present and projected employment and capital investment in the uranium industry;

(7) the level of domestic uranium production capacity sufficient to meet projected domestic nuclear power needs for a 10 year period; and

(8) a projection of domestic uranium production and uranium price levels which will be in effect under various assumptions with respect to imports.



future contingencies, such as an interrution of imports. See *1985 Viability Assessment* at x, 55-62 (evaluation of likely effects of supply interruptions).

In December 1984, the Secretary made his first viability finding pursuant to Section 2210b and the DOE criteria. The Secretary concluded that the domestic industry had been viable in 1983. In September 1985, however, he determined that in 1984 the industry was *not* viable. See *1985 Viability Assessment* at ix. In December 1986, the Secretary found that the domestic industry was not viable in 1985.

d. Four months after the Secretary's initial determination that the domestic uranium industry was not viable, the Secretary initiated a rulemaking to revise the criteria under which enrichment services are offered (see 10 C.F.R. Pt. 762). The notice of proposed rulemaking specifically addressed the question whether the depressed condition of the domestic industry required the Secretary to impose restrictions on the enrichment of foreign-source uranium under Section 2201(v) (51 Fed. Reg. 3624 (1986) (initiation of rulemaking)). The notice indicated that the Secretary proposed not to restrict the enrichment of foreign uranium, because he believed that "[i]mport restrictions on foreign uranium would not assure the viability of the domestic mining and milling industry" *(id.* at 3627).

After extensive comment, the Secretary adopted final revised criteria that did not restrict enrichment of foreign uranium (51 Fed. Reg. 27132 (1986)). The explanation of that decision addressed both the legal issue in this case, which had been raised by comments from the domestic uranium industry, and the question whether restrictions on the enrichment of foreign uranium would in fact assure

the viability of the domestic uranium industry. The Secretary adhered to the legal view that "[t]he plain language of the statute makes clear that restrictions are not to be imposed automatically if the domestic industry is non-viable, but only if they are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry" (*id.* at 27134).

On the factual question, the Secretary concluded that "restrictions would [not] assure the viability of the domestic mining and milling industry" (51 Fed. Reg. 27135 (1986)). The Secretary again found that the domestic industry's difficulties arose from "structural weaknesses," chiefly the collapse in demand that had led to a situation in which "the market simply will not sustain a price for [uranium] that enables the industry to recover its costs of production" (*ibid.*). Restrictions on enrichment would do nothing to address those basic difficulties (*ibid.*). Moreover, the Secretary determined that restrictions on enrichment would not protect domestic producers from foreign competition because of DOE's lack of market power in the market for enrichment services: "[w]hile DOE is the only provider of uranium enrichment services in the United States, DOE nonetheless lacks 'market power' because enrichment services are available, at comparable or lower costs, from foreign sources" (*ibid.*)

Having found that imposition of restrictions on enrichment would not assure the viability of the domestic uranium industry, the Secretary went on to examine the likely effects of such restrictions. He concluded that "restricting DOE's ability to enrich foreign uranium is likely to be counterproductive and to further damage the U.S. mining industry" (51 Fed. Reg. 27136 (1986)). Accordingly, the Secretary adopted final revisions to the enrichment criteria that do not restrict enrichment of foreign uranium.



2. a. Respondents, three domestic uranium mining and milling companies, brought this lawsuit in the United States District Court for the District of Colorado on December 7, 1984. The complaint challenged a number of DOE policies and alleged practices. At issue in this petition is Count I,[8] which claimed that DOE's failure to impose restrictions on the enrichment of foreign uranium is unlawful. In their summary judgment motion, respondents alleged that the only material facts were that the domestic industry is not viable and that DOE had not imposed restrictions on enrichment of foreign uranium. On those facts, respondents claimed that they were entitled to judgment as a matter of law. Respondents' Motion for Summary Judgment as to Count I. Initially, respondents asked the district court to order DOE to undertake a rulemaking to determine the appropriate level of restrictions. Later, however, they asked the district court to issue an order imposing its own restriction levels. Petitioners submitted a cross-motion for summary judgment.[9]

On June 5, 1986, the district court granted respondents' motion for summary judgment. In an oral explanation of its decision to grant respondents summary judgment on Count I, the court offered the view that Section 2201(v) requires the imposition of restrictions whenever the domestic industry is not viable, regardless of whether such restrictions would restore the viability of the industry: "To me [the statute] says that the agency * * * shall not offer [enrichment] services for source or special nuclear

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[8] The court of appeals mistakenly refers to the issue in this case as Count IV (App., *infra*, 14a).

[9] The Secretary commenced the 1986 rulemaking described in this petition while the suit was proceeding in the district court. The final rule was adopted after the district court issued its order, while that order was stayed by the court of appeals. 51 Fed. Reg. 27134 n.4 (1986). This petition does not involve a direct challenge to the revised criteria adopted in the rulemaking.

materials of foreign origin—period" (App., *infra*, 25a). The district court entered an order requiring DOE to limit its enrichment of foreign uranium to 25% of all materials enriched between June 6, 1986 and December 31, 1986, and imposing a total ban on enrichment of foreign uranium beginning January 1, 1987 (*id.* at 23a). The court further ordered DOE to commence a rulemaking to establish criteria for providing enrichment services that would "assure the maintenance of a viable domestic uranium industry"(*ibid.*).[10]

b. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit, and at the same time asked the district court for a stay of its order. When the district court did not act on that request, petitioners moved for a stay from the court of appeals, which was granted on July 21, 1986.[11]

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[10] The court stated that "[i]f the Department believes that criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry, then the Department shall clearly articulate its reasons for such a position" (App., *infra*, 23a). The court thus recognized that Section 2201(v) affords the Secretary discretion in setting the appropriate limitations in the circumstances when the statute applies. But the court's order does *not* permit the Secretary to do what he believes is clearly contemplated by the statutory language—impose *no* restrictions when it is impossible, by limiting enrichment services, to assure the viability of the domestic uranium industry.

[11] While this case was pending in the court of appeals Congress adopted a continuing resolution funding DOE and other agencies for the fiscal year that ended on September 30, 1987. That statute contained a provision expressly authorizing DOE to continue to enrich foreign uranium until this lawsuit comes to "final judgment." Pub. L. No. 99-500, § 305, 100 Stat. 1783-209.



On July 20, 1987, the court of appeals issued its decision, affirming the district court's grant of summary judgment on this issue (App., *infra*, 1a-21a).[12] The court of appeals noted that the parties agreed that the domestic uranium industry is not now viable (*id.* at 14a). Treating the issue under Section 2201(v) as one of statutory construction, the court rejected the Secretary's argument that the phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" means that restrictions need not be imposed when they will not assure the maintenance of a viable domestic industry. Instead, the court found that the statute "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable" (App., *infra*, 17a). According to the Tenth Circuit, Section 2201(v) "does not provide that increasingly stiffer restrictions are required only to the point that DOE determines that such restrictions will not resuscitate the industry" (App., *infra*, 17a-18a). At petitioners' request, the Tenth Circuit has issued a stay of its mandate that will continue until this petition is disposed of.

## REASONS FOR GRANTING THE PETITION

The decision below is seriously flawed. It violates the clear meaning of Section 2201(v), conflicts with controlling authority of this Court concerning agency interpreta-

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[12] The court of appeals also reviewed the district court's decision on another count of the complaint attacking aspects of DOE's enrichment services contracts not directly concerned with enrichment of foreign uranium. The court of appeals remanded that issue for further fact-finding to determine whether respondents had standing to maintain their claim. App., *infra*, 6a-14a. This part of the court of appeals' judgment is not challenged by this petition.

tions of statutes, rests on factual premises which directly contradict the findings of the Secretary of Energy, and threatens grave injury to the interests of the United States. Although the decision below is not in conflict with any other decision, it is highly unlikely that a conflict will develop, given that the district court's order in effect subjects DOE to a nationwide injunction prohibiting it from enriching foreign-source uranium for use in domestic commercial reactors.[13] Petitioners therefore submit that review by this Court is warranted.

1. a. Section 2201(v) directs DOE to restrict enrichment of foreign uranium in one circumstance and one circumstance only: when it is "necessary to assure the maintenance of a viable domestic uranium industry." The statute does not command, or indeed permit, the imposition of restrictions under any other set of circumstances.

The statute thus prescribes different responses on the part of the Secretary, depending on the underlying conditions in the uranium market. If the domestic industry is viable, but enrichment of foreign-source uranium might threaten its continued viability, then the Secretary is directed to impose restrictions on the enrichment of foreign uranium. Or, if the domestic industry is not viable, but restrictions on the enrichment of foreign uranium would restore it to viability, then the Secretary is also required to impose such restrictions. On the other hand, if the domestic industry is viable, and no restrictions on enrichment of foreign-source uranium are necessary to

[13] The district court's order requires DOE to refuse to enrich all foreign uranium intended for domestic use (App., *infra*, 23a). It thus has the effect of a nationwide injunction. DOE therefore cannot litigate the issue in the other courts of appeals and "gain the benefit of adjudication by different courts in different factual contexts" (*Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) (discussing difficulties posed by nationwide class actions)). Petitioners' only option is to seek review in this Court.



assure its continued viability, then the statute does *not* authorize the Secretary to restrict enrichment of foreign-source uranium. Similarly, if the industry is not viable, and no degree of restrictions on enrichment of foreign uranium would make it viable, then the statute again does *not* authorize the Secretary to impose restrictions on the enrichment of foreign uranium.

The Secretary has determined that the domestic uranium industry is not viable, and that no degree of restriction of enrichment services will render it viable (51 Fed. Reg. 27135 (1986)). Consequently, the condition precedent for imposing restrictions on the enrichment of foreign-source uranium—a finding that such restrictions are "necessary to assure the maintenance of a viable domestic industry"—is not satisfied, and the statute, by its own terms, simply does not apply.

The court of appeals rejected the Secretary's interpretation of the statute, purporting to find it inconsistent with the "unambiguous" language of Congress (App., *infra*, 17a). According to that court, the statute's use of the mandatory word "shall" indicates that the Secretary must impose restrictions on enrichment of foreign uranium whenever the domestic industry is not viable. In the court's view, the qualifying phrase, "to the extent necessary to assure the maintenance of a viable domestic uranium industry," simply "informs the DOE of the *amount* of restriction required; it does not provide a scenario in which the DOE is excused from restricting foreign enrichment notwithstanding a nonviable domestic industry" (*ibid.* (emphasis in original)).

The court of appeals did not enforce the unambiguous language of Section 2201(v). It rewrote the statute. The statute sets forth one and only one condition triggering the Secretary's duty to restrict enrichment of foreign uranium: a finding that such a restriction is necessary to "assure the maintenance of a viable domestic uranium industry."

Under the court of appeals' interpretation, however, the statute contains in effect two conditions triggering the requirement to restrict enrichment services. As the lower court construed the statute, the Secretary must impose restrictions on the enrichment of foreign uranium *either* when it is necessary to assure the maintenance of a viable domestic uranium industry, *or* when the domestic uranium industry is not viable. The statute, however, contains only one condition; to construe the statute as imposing some other condition is to engage not in interpretation but in judicial amendment.

The legislative history supports this conclusion. There is no suggestion in that history that Congress thought it was creating a mechanical rule that would require the Secretary to impose a "100% restriction" under certain circumstances. The statute directs the Secretary to limit the enrichment of foreign uranium "to the extent necessary" to assure the viability of domestic producers—language that suggests the exercise of discretion. The Joint Committee, in explaining the new provision, described it as a "flexible restriction" that would allow the agency "to survey periodically the condition of the domestic and world uranium market and to offer * * * enrichment services on a basis which will assure, *in its opinion*, the maintenance of a viable domestic uranium industry" (Private Ownership Act Report 31 (emphasis supplied)). This clearly suggests that Section 2201(v) was thought of as a standard calling for the exercise of judgment by the Secretary, not as an automatic cutoff that would apply regardless of the Secretary's findings about underlying market conditions.

Under the court of appeals' construction, however, once the Secretary finds the domestic industry is not viable, "restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction" (App., *infra*, 17a). This mechanical rule finds no support in the



legislative history, and ignores the usual relationship between Congress and the Executive, in which expert agencies apply congressional policy to changing facts (see, *e.g.*, *United States* v. *Shimer*, 367 U.S. 374, 382 (1961)).

Indeed, the construction imposed by the court of appeals leads to absurd results. If, for example, the Secretary had found that the domestic uranium industry was not viable because all American uranium reserves had been exhausted, the interpretation adopted by the court of appeals would nevertheless require DOE to cease all enrichment of foreign uranium. But if there were no domestic uranium to enrich, and DOE was barred from enriching foreign uranium, then DOE would have no choice but to close its doors. Presumably, the fuel needs of American nuclear power plants would then have to be satisfied by importing foreign uranium *enriched* elsewhere—in Europe or the Soviet Union—while DOE's enrichment facilities stood idle.

b. The text and legislative history of Section 2201(v) compel the conclusion reached by DOE: restrictions are required only when they would assure the maintenance of a viable domestic uranium industry. If there were any difficulty in the interpretation of Section 2201(v), however, the court of appeals should have deferred to the considered views of the Secretary rather than simply imposing its own preferred reading. As this Court has explained, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissable construction of the statute" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted)).

In this respect, the case is controlled by *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986). There, the FDA's decision not to promulgate regulations limiting the quantity of a certain carcinogen present in

foods was challenged. The FDA's statutory mandate, drawn in words that parallel the language of Section 2201(v), stated that the Administrator "shall promulgate regulations limiting the quantity [of such substances] to such extent as he finds necessary for the protection of public health." Like the lower courts here, the respondents in *Young* "view[ed] the word 'shall' as unqualified," and argued that the phrase "to such extent as he finds necessary" gave the agency "discretion in setting the particular tolerance level, but not in deciding whether to set a tolerance level at all" (slip op. 5). Rejecting that argument, this Court deferred to the FDA's intepretation of the statute, which was "that the phrase 'to such extent as he finds necessary for the protection of public health' * * * modifies the word 'shall' " (*ibid.*). This agency construction, the Court held, was "sufficiently rational to preclude a court from substituting its judgment for that of the FDA" (*id.* at 7).

The decision below cannot be squared with this Court's holding in *Young*. In *Young*, the Court found that "the phrasing" of the statute at issue was "ambiguous" because the decisive "appositive phrase"—"to such extent as he finds necessary"—was "free-floating" (slip op. 6). In Section 2201(v), however, the phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" appears as a prefix to the word "shall," and is clearly the condition precedent of the statutory obligation. Moreover, in *Young* either of the two competing constructions could have been adopted without "endors[ing] an absurd result" whereas, here, the operation of Section 2201(v) would only be "sensible" if DOE's interpretation is upheld (slip op. 7). Finally, the legislative history of the statute at issue in *Young* "provide[d] no single view" about the nature of the decision that was delegated to the agency (*ibid.*). In contrast, the legislative history of Section 2201(v) strongly supports the construction that DOE has



given to the statutory provision. Accordingly, this Court's disposition of the much closer question in *Young* necessarily requires deference to DOE's construction of Section 2201(v).[14]

2. The court of appeals appears to have disagreed with the Secretary's interpretation of Section 2201(v) in part because it implicitly disagreed with—or simply ignored—the Secretary's findings about the state of the domestic uranium industry. The court found that Section 2201(v) "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed * * * *until the domestic industry is rejuvenated and becomes viable*" (App., *infra*, 17a (emphasis supplied)). This clearly implies that restrictions on the enrichment of foreign uranium under present market conditions *would* revive the domestic industry—which is exactly contrary to what the Secretary found. Later, the court opined that "DOE cannot accomplish its statutory purpose—the maintenance of a viable domestic uranium industry—without imposing

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[14] The court of appeals appears to have misunderstood DOE's argument based on *Young*, suggesting that the Secretary was asserting that he had discretion to "abandon the statutory goal" (App., *infra*, 18a). But DOE has never maintained that it has discretion to ignore Section 2201(v). On the contrary, in response to comments on the 1986 rulemaking, the the Secretary found that "[t]he plain language of the statute makes clear that restrictions are not to be imposed automatically if the domestic mining industry is non-viable, but only if they are needed to, and in fact, will assure the maintenance of a viable domestic industry" (51 Fed. Reg. 27134 (1986)). Thus, the Secretary does not argue, as the court of appeals seems to have believed, that DOE need not comply with Section 2201(v) because "this policy is not wise in the present uranium market" (App., *infra*, 18a). The question in this case is not whether the statute is wise but rather what it means.

restrictions on enrichment of foreign uranium" (*id.* at 18a). This too suggests, contrary to the Secretary, that restrictions on enrichment of foreign-source uranium would somehow further the statutory purpose. In a similar vein, the court asserted that "DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. It must continue to increase restrictions *until the domestic industry becomes viable*" (*ibid.* (emphasis supplied)). Again, this suggests a vision of the facts which is exactly the opposite of what the Secretary found.

Perhaps if the domestic uranium industry did not have enormous excess capacity, if DOE had a complete monopoly on enrichment services and if there were no secondary market for enriched uranium, then the court of appeals might have been warranted in assuming that a "100% restriction" on the enrichment of foreign uranium could revive the domestic industry. But that is not the current state of the domestic uranium market, as determined by the Secretary. On the contrary, the Secretary found that because of excess capacity and severely depressed prices, competition from foreign sources of enriched uranium, and an active secondary market in enriched uranium, any restriction on the provision of enrichment services to foreign uranium would provide at best only transitory relief. 51 Fed. Reg. 27135-27138 (1986).[15]

[15] It is possible (though by no means certain) that in the short term the imposition of restrictions would lead to increased consumption of domestic uranium, although DOE believes that any such benefit would not be enough to make the industry viable (51 Fed. Reg. 27136 (1986)). This possibility, which would lead to temporarily increased income for respondents, is sufficient, we believe, to satisfy the "distinct and palpable injury" requirement of Article III (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)).



It is of course elementary that " '[o]n summary judgment the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the motion.' " *Matsushita Elec. Ind. Co.* v. *Zenith Radio*, No. 83-2004 (Mar. 26, 1986), slip op. 12 (quoting *United States* v. *Deibold, Inc.*, 369 U.S. 654, 655 (1962)). This principle applies with equal force to issues of disputed fact about market structures or other economic conditions (see, *e.g.*, *United States* v. *Diebold, supra*). If the court of appeals was not convinced by the Secretary's analysis of conditions in the domestic uranium industry, the proper course, at most, would have been to reverse the district court's decision granting summary judgment and either to remand for further proceedings to determine whether the Secretary's findings were arbitrary, capricious or an abuse of discretion, or to remand with instructions to direct the Secretary to conduct a further investigation into the conditions of the domestic uranium industry.[16] It was manifestly improper, however, for the court of appeals silently to substitute its views of the domestic uranium market for the findings of the Secretary, and then to use those views, which have no support in the record, as part of the justification for a mechanical imposition of restrictions under Section 2201(v).

3. The court of appeals' decision affirms an injunction which prohibits DOE from providing any enrichment services to foreign uranium. This order, if left unreviewed, will have very serious adverse consequences for electric

[16] Respondents have never challenged the Secretary's determination that restrictions would not assure the maintenance of a viable domestic uranium industry. Rather, they have argued that as a matter of law the Secretary is required to impose restrictions whenever the industry is not viable, whether or not those restrictions would accomplish (or even further) the statutory goal. In the absence of any such challenge to the Secretary's findings, it would in fact have been appropriate to grant *petitioners'* motion for summary judgment.

utilities, DOE's enrichment program, and United States trade, nuclear cooperation and nonproliferation policies.

a. The district court's injunction confronts utilities who have agreed to purchase foreign uranium feed stock[17] and have contracted with DOE for enrichment services with a dilemma. DOE's enrichment contracts impose cancellation penalties for failure to use contracted-for services (see 10 C.F.R. 762.10). Thus, unless these utilities can break their contracts with DOE, they will either have to obtain domestic uranium for DOE to enrich, or pay the cancellation penalties and obtain enrichment services elsewhere. If the utilities go forward with DOE enrichment, they either will have to dispose of the foreign uranium they have purchased or break their purchase agreements.[18]

b. The district court's order also poses a grave danger to DOE's commercial enrichment operation. Enrichment fees from domestic utilities amount to hundreds of millions of dollars a year. In the 1986 rulemaking, DOE stated that "[l]ost sales resulting from [customer] terminations could reach at least $300 million annually by 1988" (51 Fed. Reg. 3627 (1986)). Indeed, current customers, in response to the district court's order, have suggested that they would attempt to rescind their contracts entirely if

[17] For the period between 1985 and 1990, United States utilities are estimated to have contracted for some $780 million worth of foreign uranium (Petitioners' C. A. Mot. for Stay Pending Appeal, App. 58, 73).

[18] The utilities' decision will depend on the comparison between (i) the termination charge and other expenses associated with breaking their enrichment contracts and (ii) the additional expense that would be involved in obtaining domestic uranium (see 51 Fed. Reg. 27136 (1986)). As DOE noted in its 1986 rulemaking, any incentive to buy domestic uranium will be concentrated in the early years of the contracts, when termination charges are highest (*ibid.*). DOE determined in that rulemaking that this incentive would not be sufficient to make the domestic uranium industry viable even in the short term (*ibid.*).



DOE is unable to enrich foreign uranium. Successful legal action would mean the loss of termination fees and possibly even the award of substantial damages against DOE for breach of its enrichment contracts. 51 Fed. Reg. 27136 n.10 (1986). The immediate threat to DOE, and hence to the treasury, thus runs well into the hundreds of millions of dollars and may amount to more than a billion. Moreover, because Section 2201(v) requires DOE to price its enrichment services so as to cover its costs, a substantial contraction of DOE's customer base would "force DOE to further curtail operations at its enrichment plants, increasing the unit cost of production, and thus drive more of DOE's customers overseas" (51 Fed. Reg. 27137 (1986)). This could produce a spiral of increasing costs and decreasing volume that eventually could eliminate DOE's commercial enrichment operations.[19]

c. The least readily quantified but perhaps the most important consequences of the district court's order would be felt by United States foreign policy, specifically trade and international nuclear policy. Most of the uranium imported into this country comes from Canada, our largest trading partner, and Australia, a close ally with which we have a trade surplus. Both Canada and Australia have presented Diplomatic Notes to the Department of State, setting forth in the strongest terms their objection to the injunction imposed by the district court (51 Fed. Reg. 27137 n.17 (1986) (quoting Notes)). The Notes suggest that the imposition of restrictions under Section 2201(v) would be inconsistent with the United States' obligations under

[19] The damage done by the district court's order, if it is allowed to stand, will be shared between the utilities and DOE (and other parties, including possibly the domestic uranium industry, see 51 Fed. Reg. 27136 (1986) (explaining that restrictions probably would lead consumers simply to obtain both uranium and enrichment abroad)) in a manner that cannot be predicted.

the General Agreement on Tariffs and Trade (GATT). 51 Fed. Reg. 27137 n.17 (1986).[20] No matter how the GATT issue might be resolved, the restrictions would have, in the words of the United States Trade Representative in a letter to the Secretary of Energy, " 'an adverse impact on our trade and other relationships with important trading partners without resolving the long-term problems of the industry' " (*id.* at 27137 (citation omitted)).

Trade is not the only aspect of foreign policy implicated by the decision below. Congress has determined that "the proliferation of nuclear explosive devices or of the direct capability to manufacture or otherwise acquire such devices poses a grave threat to the security interests of the United States" (Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, § 2, 92 Stat. 120). The decision below threatens American non-proliferation efforts in two ways. First, the damage to the competitive position of DOE's enrichment program discussed above threatens a loss of DOE's foreign enrichment customers. Nuclear fuel exported from the United States is subject to stringent conditions designed to ensure that it is used in a manner consistent with United States non-proliferation policy (§§ 304-307, 92 Stat. 131-138 (codified at 42 U.S.C. 2155-2158)). As the Department of State noted in commenting on the issue presented in this litigation, a shift away from DOE enrichment by foreign customers would replace those strict controls with "the controls of foreign

[20] The Diplomatic Notes presented to the Department of State by Canada and Australia in response to the district court's decision were attached to petitioners' June 1986 motion to the Tenth Circuit for a stay pending appeal. After the court of appeals delivered its decision in July 1987, Canada and Australia once again presented Notes reiterating their position. Diplomatic Note No. 194 from the Embassy of Canada (July 22, 1987); Diplomatic Note No. 237/87 from the Embassy of Australia (July 24, 1987).



enrichers, none of whom follows as stringent non-proliferation conditions as those required by U.S. law" (51 Fed. Reg. 27137 n.15 (1986) (declaration of Deputy Assistant Secretary of State for Nuclear Energy and Energy Technology Affairs James Devine)). Moreover, "[a] decline in DOE's position in the enrichment market would also create an increased commercial incentive for the spread of nuclear enrichment technology, which has potential nuclear weapons application" (*ibid.*).

More subtle but no less real is the impact of this decision on the general perception of the United States as a partner in nuclear cooperation. United States nuclear cooperation is accompanied by a number of very strict controls and limitations, designed to ensure that cooperating countries use American expertise in a manner consistent with United States non-proliferation policy (42 U.S.C. (& Supp. III) 2153). Nuclear cooperation, however, is available from sources other than the United States, some of which do not apply the same strict non-proliferation controls. Third countries will choose to obtain assistance and cooperation from the United States, and thereby accept the limits on their use of nuclear technology imposed by Congress, only if they perceive the United States to be an absolutely reliable partner.

The decision below threatens that perception. As Deputy Assistant Secretary of State Devine explained, "[u]nless the 'rules of the game' for nuclear cooperation are consistent and clear, there is a risk that such cooperation will be diminished and that the credibility and influence of the United States on nuclear non-proliferation matters in both bilateral and multilateral contexts will be undermined" (51 Fed. Reg. 27137 n.15 (1986)).

If the lower courts were correct in finding that Congress has chosen a policy that threatens international perceptions of American reliability, then of course that policy must be followed until Congress changes it, whatever the

consequences. We suggest, however, that a decision touching concerns of such delicacy and importance is best reviewed in this Court.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

RICHARD K. WILLARD
*Assistant Attorney General*

THOMAS W. MERRILL
*Deputy Solicitor General*

JOHN HARRISON
*Assistant to the Solicitor General*

LEONARD SCHAITMAN
RICHARD A. OLDERMAN
*Attorneys*

OCTOBER 1987

**APPENDIX A**

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Nos. 85-2428 and 86-1942

WESTERN NUCLEAR, INC., ENERGY FUELS NUCLEAR, INC., URANIUM RESOURCES, INC., PLAINTIFFS-APPELLEES

*v.*

F. CLARK HUFFMAN, AS CHIEF ENRICHMENT SERVICES BRANCH, ENRICHING OPERATIONS DIVISION, DEPARTMENT OF ENERGY; SHERRY E. PESKE, AS ACTING DIRECTOR OF MARKETING AND BUSINESS OPERATIONS (URANIUM ENRICHMENT) OF THE DEPARTMENT OF ENERGY; JOHN R. LOGENECKER, AS DEPUTY ASSISTANT SECRETARY OF URANIUM ENRICHMENT OF THE DEPARTMENT OF ENERGY; WILLIAM R. VOIGT, AS SPECIAL ASSISTANT FOR STRATEGIC POLICY ASSESSMENT TO THE ASSISTANT SECRETARY FOR NUCLEAR ENERGY OF THE DEPARTMENT OF ENERGY; JAMES W. VAUGHN, AS ASSISTANT SECRETARY FOR NUCLEAR ENERGY OF THE DEPARTMENT OF ENERGY; EARL GHELDE, AS SPECIAL ASSISTANT TO THE SECRETARY OF THE DEPARTMENT OF ENERGY; DANIEL BOGGS, AS UNDER SECRETARY OF THE DEPARTMENT OF ENERGY; DONALD P. HODEL, AS SECRETARY OF THE DEPARTMENT OF ENERGY; UNITED STATES DEPARTMENT OF ENERGY,

DEFENDANTS-APPELLANTS

CITY OF SAN ANTONIO, ACTING BY AND THROUGH THE CITY PUBLIC SERVICE BOARD OF SAN ANTONIO, DUKE POWER COMPANY; GULF STATES UTILITIES COMPANY; HOUSTON LIGHTING & POWER COMPANY; KANSAS CITY POWER & LIGHT COMPANY; KANSAS ELECTRIC COOPERATIVES, INC.; KANSAS GAS & ELECTRIC COMPANY; NEW YORK POWER AUTHORITY; OHIO EDISON COMPANY;

PENNSYLVANIA POWER & LIGHT COMPANY; PHILADELPHIA ELECTRIC COMPANY; PUBLIC SERVICE COMPANY OF COLORADO; PUBLIC SERVICE ELECTRIC & GAS COMPANY; SOUTHERN CALIFORNIA EDISON COMPANY; SOUTHERN COMPANY SERVICES, INC.; THE CONNECTICUT LIGHT AND POWER COMPANY; THE TOLEDO EDISON COMPANY; VIRGINIA ELECTRIC AND POWER COMPANY; WESTERN MASSACHUSETTS ELECTRIC COMPANY; WISCONSIN ELECTRIC POWER COMPANY; UNION ELECTRIC COMPANY; BALTIMORE GAS & ELECTRIC COMPANY; ARKANSAS POWER & LIGHT COMPANY; MIDDLE SOUTH ENERGY, INC.; MIDDLE SOUTH SERVICES, INC.; AND LOUISIANA POWER & LIGHT,

AMICI CURIAE

NATIONAL TAXPAYERS UNION,

AMICUS CURIAE

STATES OF WYOMING, NEW MEXICO, COLORADO, UTAH AND NEVADA,

AMICI CURIAE

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO**

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[Filed July 20, 1987]

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Before McKAY, McWILLIAMS and BALDOCK, Circuit Judges.

McKAY, Circuit Judge.

Plaintiffs, three uranium mining and milling companies, filed a five-count complaint challenging various Department of Energy (DOE) policies. Shortly after filing the complaint, plaintiffs moved for summary judgment on count two, which challenged the DOE's use of the recently



adopted uranium enrichment services contract (UESC). The district court granted plaintiffs' motion, and the DOE appealed. While that appeal was pending, the district court also granted plaintiffs' summary judgment motion on count four, which alleged that the DOE was statutorily required to restrict enrichment of foreign uranium. The DOE appealed that decision, and we consolidated the two appeals.

This case raises important issues, the resolution of which will affect not only the parties involved in this suit but also all utilities that use nuclear power as well as the eventual consumers who purchase power from such utilities. A brief exposition of the nuclear industry and its history is helpful in understanding these important issues and their ramifications.

## I. Background

Private-entity involvement in the nuclear industry evolved gradually. In its infancy, the Government had a complete monopoly over the nuclear industry. It owned all uranium, all nuclear fuel, and all nuclear production and utilization facilities. Initially, the Atomic Energy Commission (AEC), the DOE's predecessor, controlled these operations. The AEC did permit private entities to mine uranium ore, but these entities could only sell to the Government. In 1954, Congress enacted legislation that permitted private ownership of nuclear reactors as well as private possession and use, but not ownership, of nuclear fuel. The AEC issued licenses permitting use of nuclear fuel and monitored entities that owned reactors and used nuclear fuel. However, private entities that mined uranium ore continued to have only one customer—the Federal Government. Finally, in 1964, Congress passed legislation permitting private ownership of nuclear fuel and allowing uranium mining and milling companies to sell to private entities.

Notwithstanding this shift to the private sector, the Government continued to play an important role in the nuclear fuel cycle. The natural uranium mined could not be used directly as nuclear fuel by the private entities that bought it. Natural uranium consists of less than one percent U-235, and nuclear fuel must contain approximately three percent U-235. Thus, to be used as nuclear fuel, uranium must have a higher concentration of U-235 than is found in nature. The process that produces this high concentration is called "enrichment", and, in 1964, the AEC was the only entity in the world with enrichment facilities. Consequently, private entities could not use natural uranium unless the AEC first enriched it to the level required for use as nuclear fuel. Congress recognized this and, when it privatized the ownership of nuclear fuel, permitted the AEC to contract with private entities for the provision of enrichment services. In order to protect the economic strength of the domestic uranium industry, Congress also restricted enrichment of foreign uranium when the resulting nuclear fuel was designated for use in domestic facilities. Initially, the AEC was not permitted to enrich any foreign uranium for domestic use. As demand for nuclear fuel increased, however, the restrictions were phased out, and the AEC, later the DOE, eventually provided enrichment services for both domestic and foreign uranium.

Increases in demand for nuclear fuel also encouraged foreign entities to build enrichment facilities. This increased the competition for enrichment and permitted some of the DOE's domestic and foreign customers to obtain enrichment services outside the United States. As long as demand for nuclear fuel continued to increase, neither the DOE nor the domestic mining and milling companies were overly concerned with foreign competition. Rather, they were operating at capacity and were not threatened by the foreign competition.



The boom, however, was followed by a bust. Private entities that expected uranium demand to exceed supply had entered longterm contracts for uranium and for enrichment services. The quantities were based on forecasts of nuclear fuel needs in all present and future facilities. Unfortunately, many nuclear facilities were not completed on schedule, or were never completed, and private entities were left with huge stockpiles of nuclear fuel and no place to use it. Some sold nuclear fuel to other entities and, as their contracts expired, stopped purchasing both uranium and nuclear fuel. Others, however, began to purchase higher quality uranium at lower costs from now fully operational foreign mines.

The DOE also faced increased foreign competition in the enrichment field. It responded by offering enrichment services on new and different terms. Restrictions on enrichment of foreign uranium had long since been discontinued, but the DOE now offered a variable-tails option in order to attract customers away from the foreign competition. Tails are the depleted uranium left over after the enrichment process is completed. A DOE customer could select a low tails assay—a low concentration of U-235 in the tails—and decrease the uranium in the enrichment process. In other words, by increasing the enrichment used on a particular quantity of uranium, the DOE was able to increase the amount of enriched uranium produced from a given quantity of natural uranium. By offering the variable-tails option, the DOE permitted its customers to use more uranium and less enrichment services or less uranium and more enrichment services.

These DOE policies with respect to enriching foreign uranium and offering a variable-tails option increased the perceived economic threat to domestic uranium mining and milling companies. They faced increased use of foreign uranium as well as decreased use of uranium in general because of the new variable-tails option. Plaintiffs

and other mining and milling companies responded by requesting that the DOE implement restrictions on enrichment of foreign uranium as required by 42 U.S.C. § 2201 (v) (1982), which provides that the DOE, "to the extent necessary to assure the maintenance of a viable domestic uranium industry shall not offer [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States." The DOE initially refused, claiming that the domestic mining and milling industry was viable, and, thus, section 2201 (v) did not require any restrictions. In 1984 and again in 1985, however, the DOE expressly found that the domestic uranium industry was not viable. Even so, it still refused to impose restrictions, now claiming that even if restrictions were imposed the domestic industry would not become viable.

Meanwhile, the DOE was grappling with economic problems of its own. It had become the high cost provider of enrichment services and had lost many of its customers to foreign enrichers. In an attempt to recapture part of the market, the DOE adopted the UESC. This standard form contract provided lower prices, encouraged use of foreign source uranium, and permitted a variable-tails option. Prior to using the UESC, the DOE did not implement any rulemaking procedures pursuant to the Administrative Procedure Act or submit the contract to Congress.

Plaintiffs, already threatened by the precarious economic state of the uranium industry, felt further threatened by the UESC and thereafter filed their complaint in this matter.

### II. Challenge to Uranium Enrichment Services Contract

In count two of their complaint, plaintiffs challenged the DOE's adoption of the UESC. The claim was based on both substantive and procedural grounds, but the district court reached only the latter in concluding that the



adoption of the UESC was procedurally defective. It stated:

> I conclude that the new [UESC] amounts to a change in the "criteria" under which enrichment services are to be performed. Because the contract was not submitted to Congress, it is null and void.
>
> Accordingly, it is ordered that the plaintiffs motion for partial summary judgment as to Count II is granted.

Amended Order, record, vol. 2, doc. 15, at 4.

The DOE now challenges the decision on count two, claiming that: (1) plaintiffs' claim is moot; (2) plaintiffs lack standing; and (3) the district court was erroneous on the merits.

#### A. *Mootness*

Mootness goes to the jurisdiction of a federal court. To satisfy the "case or controversy" limitation of Article III, "[t]he actual controversy between the parties 'must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.' " *Wiley*, 612 F.2d at 475 (quoting *Roe v. Wade*, 410 U.S. 113, 125 (1973)). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 496 (1969). "The burden of demonstrating mootness 'is a heavy one,' " *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)), and can be satisfied only if two conditions are shown:

> (1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur, see [*W.T. Grant*, 345 U.S.) at 633; see also *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972), and

> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See, *e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Indiana Employment Security Div. v. Burney* 409 U.S. 540 (1973).

*Davis*, 440 U.S at 631.

We need only reach the second condition. The DOE asserts that plaintiffs' sole challenge to the UESC was that its implementation was procedurally defective. Indeed, the grounds for the district court's granting of plaintiffs' summary judgment motion was that "the [UESC] amounts to a change in the 'criteria' under which enrichment services are to be performed [and it] was not submitted to Congress." *Western Nuclear, Inc. v. Huffman*, No. 84-C-2315, slip op. at 4 (D. Colo. Sept. 19, 1985). Since the district court's decision in this case, the DOE has submitted the UESC to rulemaking procedures. DOE, therefore, argues that plaintiffs' appeal is moot.

We need not determine whether subsequent DOE and congressional activity cured any alleged procedural defects in this case and thus mooted plaintiffs' claim. Their challenge was not based only on procedural grounds; it included substantive grounds as well, and plaintiffs' substantive challenge to the UESC remains viable. The DOE admits that the criteria adopted through the subsequent rulemaking procedures are the same as those embodied in the UESC. Consequently, if substantive deficiencies existed before the DOE rulemaking process, they still exist.

Because we conclude that the DOE has not shown that plaintiffs' claim has been eradicated by subsequent rulemaking, we need not reach the issue of whether the violations can recur. The DOE has failed to show that plaintiffs' claim is moot.



**B.** ***Standing***

Even though the DOE did not challenge plaintiffs' standing in the district court, we must address that issue before we can reach the merits of this case.

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. *See, e.g., Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173-180, 2 L.Ed. 60 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 165, 79 L.Ed. 338 (1934).

*Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1331 (1986). One jurisdictional requirement is that of standing.

Standing focuses on whether a particular plaintiff has the right to pursue a cause of action. "[L]ike mootness and ripeness, [it] 'has its constitutional origins in the "case or controversy" limitation of Article III which insures that courts exercise their power only in cases where true adversary context allows informed judicial resolution.'" *Citizens Concerned for Separation of Church & State v. City of Denver*, 628 F.2d 1289, 1294 (10th Cir. 1980) (quoting *Wiley v. National Collegiate Athletic Ass'n*, 612 F.2d 473, 475 (10th Cir. 1979), *cert. denied*, 446 U.S. 943 (1980)), *cert. denied*, 452 U.S. 963 (1981). While the courts have not always been clear as to which standing requirements are based on the Constitution and which are based on prudential concerns of the courts, they have established that

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he

> personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

*Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Consequently, to establish standing plaintiffs must show[1] that the DOE's adoption of the UESC has injured them and that the court can redress that injury by invalidating the UESC.

Plaintiffs claim they have met this burden because the DOE, by filing its cross-motion for summary judgment without challenging standing, implicitly acknowledged plaintiffs' standing. However, "[p]arties may not by stipulation invoke judicial power of the United States in litigation which does not present an actual case or controversy, and jurisdictional questions are of primary consideration and can be raised at any time by courts on their own motion." *City of Denver*, 628 F.2d at 1296-97 (citations omitted). Thus, the DOE cannot consent to plaintiffs' standing. In fact, even if no party challenged standing, we are required to raise the issue.

At the summary judgment stage, plaintiffs are entitled to prevail only if the record shows "that there is no genuine issue as to any material fact and that [plaintiffs are] entitled to a judgment as a matter of law." Fed. R. Civ. P.

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[1] Plaintiffs bear the burden of proving standing. This "burden is not insurmountable; they need only demonstrate a 'substantial likelihood' that the causal link exists," *Munoz-Mendoze v. Pierce*, 711 F.2d 421, 427 (1st Cir. 1983), and "that the relief requested will redress the injury." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978).



56(c). When the standing issue is not raised in the district court, review on appeal may reveal factual disputes. *See, e.g., Steele v. National Firearms Act Branch*, 755 F.2d 1410, 1414 (11th Cir. 1985).

The factual dispute with respect to standing in this case revolves around the causation element of standing. The parties agree that plaintiffs have been harmed by the decline in demand for domestic uranium; however, they disagree on whether the adoption of the UESC has any nexus to that decline. An affidavit filed by plaintiffs in support of their motion for summary judgment states in relevant part:

> DOE policies with respect to the provision of enrichment services can have and do have a significant impact on demand for uranium and, consequently, the viability of the domestic uranium industry. For example, independent consultants (*e.g.*, Nuexco and Nuclear Resources International) indicate that DOE's new [UESC] may diminish demand for uranium by as much as 100,000,000 pounds or more over the next five to ten years. This approximates or exceeds expected production for the period.

Plaintiff's Memorandum in Support of Motion for Summary Judgment on Count II, record, vol. 1, doc. 3, Exhibit B (affidavit of Larry A. Boggs), at ¶ 2. To support the causal link, and thus standing, between the adoption of the UESC and the decrease in demand for domestic uranium, plaintiffs argues on appeal that the UESC: (1) fails to restrict enrichment of foreign uranium; (2) permits enrichment customers to select a variable-tail assay that increases the use of enrichment services and decreases the use of uranium; and (3) contains pricing provisions that decrease demand for domestic uranium. If the UESC is invalidated, plaintiffs argue, these policies will be reversed and the demand for domestic uranium will consequently increase. However, since standing was not challenged in

the district court, the record fails to explain how the UESC would decrease demand for domestic uranium and thereby cause plaintiffs harm. Plaintiffs' claim that we may look beyond the record to the circumstances surrounding the case is inaccurate. The Supreme Court has specifically stated that "[t]he existence of a justiciable 'case' or 'controversy' under Art. III must affirmatively appear in the record." *Bender*, 106 S. Ct. at 1334.

Notwithstanding DOE's failure to challenge plaintiffs' standing at the trial level, it did specifically refute plaintiffs' claim that the UESC harmed them because it decreased demand for domestic uranium. The DOE claimed in that forum that the UESC did not amend existing DOE policy and, thus, could not change the demand for domestic uranium. On this appeal, the DOE renews this contention by arguing that even though the demand for domestic uranium has declined and will likely continue to decline, the adoption of the UESC did not affect that demand and, consequently, plaintiffs do not have standing to challenge the UESC. It maintains that the policies behind the UESC existed prior to its adoption and would continue to exist even if the UESC were declared null and void.

Plaintiffs conceded in their complaint that the DOE did not restrict enrichment of foreign uranium and allowed customers to select a variable-tail assay before the adoption of the UESC. *See* Complaint, record, vol. 1, doc. 1 at 9, 17, 18. An injury that "occurred before, existed at the time of, and continued unchanged after the challenged" action cannot support a standing claim. *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 827 (D.C. Cir. 1985). Policies ostensibly harming plaintiffs that existed prior to the adoption of the UESC are insufficient to vest plaintiffs with standing to challenge the legality of the UESC. However, the record in this case is unclear as to whether adoption of the UESC did in fact



effect a change in DOE policies regarding enrichment of foreign uranium and availability of variable-tail assays. The UESC may have implemented more lenient policies that exacerbated the economic harm already experienced by plaintiffs. This unresolved factual dispute surrounding the causation component of the standing inquiry may not be resolved on appeal.

Plaintiffs argue alternatively that UESC pricing of DOE enrichment services may decrease demand for domestic uranium, thus harming them and supporting standing to challenge the UESC. Plaintiffs cannot argue that lower enrichment prices decrease domestic uranium sales. If the DOE has higher prices, DOE customers are encouraged to seek enrichment services from DOE's foreign competitors. Both parties agree that entities who use foreign enrichers also tend to purchase foreign uranium. Consequently, a decrease in DOE enrichment prices should encourage domestic enrichment and, concomitantly, domestic uranium purchases. On the other hand, plaintiffs may be arguing that new pricing techniques favor foreign uranium over domestic uranium and, thus, decrease demand for domestic uranium. We find this doubtful because section 2201(v) specifically mandates that pricing of enrichment services be nondiscriminatory. Nonetheless, plaintiffs should be permitted to present whatever factual support they have for this argument on remand.

Because of the unresolved factual dispute surrounding the causation component of the standing inquiry, we cannot conclude that plaintiffs have satisfied their burden on appeal of establishing standing. However, because the DOE failed to contest standing in the district court, plaintiffs should be allowed to present evidence supporting their standing allegations. "Factual issues concerning the existence of the standing requirements in a particular case are to be resolved in the same manner as any other con-

troverted fact." *Steele*, 755 F.2d at 1414. Thus, we remand for resolution of the factual dispute which will be determinative of plaintiffs' standing to challenge the UESC.

### C. *Merits*

Because the issue of standing on this claim remains unresolved, any opinion on the merits of this case would be an advisory opinion. "[F]ederal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Pub. Workers of Am. v. Mitchell*, 300 U.S. 75, 89 (1947). Thus, we cannot reach the merits of plaintiffs' challenge to the UESC.

## III. Restrictions on Enrichment of Foreign Uranium

Count four of plaintiffs' complaint alleges that the DOE violated 42 U.S.C. § 2201(v) (1982) when it refused to restrict enrichment of foreign uranium despite a determination that the domestic uranium industry was not viable. The DOE argues that restrictions are only required if they would make the domestic uranium industry viable and that restrictions at this time would not result in a viable industry. The district court interpreted section 2201(v) to require the DOE to restrict enrichment of foreign uranium whenever the domestic industry is not viable—whether or not such restriction would result in successful resuscitation of the uranium industry. The DOE appealed and moved to stay enforcement of the district court order until the appeal was finally decided. We granted the motion to stay and expedited the appeal.

This case is one of statutory interpretation. The parties agree that the domestic uranium industry is not viable and agree that the DOE's actions are controlled by section 2201(v). However, they disagree on the meaning of that statute. Even under current law, which requires great



deference to agency interpretation of statutes, the Supreme Court has recognized that

> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (citations omitted). Under this authority, the district court decided that, unless the DOE determines that something other than restrictions will assure the viability of the domestic uranium industry, section 2201(v) requires restrictions on enrichment of foreign uranium whenever the domestic industry is not viable. Since this is a statutory interpretation question, we review that decision *de novo*. *See Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986); *City of Edmonds v. United States Dep't of Labor*, 749 F.2d 1419, 1421 n.2 (9th Cir. 1984).

The courts have long recognized that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also Rubin v. United States*, 449 U.S. 424, 429 (1981). "When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in "rare and exceptional circumstances. "' " *Id.* at 430 (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). Even when an agency interpretation is normally entitled to deference, "(i)f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A.*, 467 U.S. at 842-43. Thus, we look first to the language of the statute, and if it is

unambiguous, we look to the legislative history only to determine if exceptional circumstances dictate an interpretation contrary to the language of the statute.

As noted, the relevant portion of the statute provides that "*to the extent necessary to assure the maintenance of a viable domestic uranium industry, [the DOE] shall not offer*" enrichment services for foreign-source uranium designated for use in the United States. 42 U.S.C. § 2201(v) (emphasis added). The DOE relies on *Young v. Community Nutrition Institute*, 106 S. Ct. 2360 (1986), in arguing that the phrase "to the extent necessary" gives it discretion to determine whether to restrict enrichment of foreign uranium. The Supreme Court in *Young* was interpreting 21 U.S.C. § 346 (1982), which states:

> Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342 (a) of this title; but when such substance is so required or cannot be avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon *to such extent as he finds necessary for the protection of public health*, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342(a) of this title.

(Emphasis added.) The FDA's longstanding interpretation was that the phrase "to such extent as he finds necessary for the protection of public health" modified the word "shall." Thus, the FDA was of the opinion that it was to determine when regulation was necessary to protect public health. Having determined that regulating aflatoxin (a poisonous substance present in some foods) was not necessary to protect the public health, the FDA did not promulgate regulations. The Supreme Court decided that



it was unclear whether the critical phrase modified "shall" or "the quantity therein or thereon." As a result, the Supreme Court concluded that the courts should adopt the agency interpretation of the statute as a reasonable one. The critical point in the analysis was that the "FDA [had] advanced an interpretation of an ambiguous statutory provision." *Young*, 106 S. Ct. 2365. Once that point was reached, the Court was required to defer to the reasonable interpretation of the agency.

The case before us presents a different situation. Congress, in enacting section 2201(v), used unambiguous language. It stated "the [DOE] . . . shall not offer" the enrichment of foreign uranium. The use of "shall" is usually mandatory language and will require action unless a convincing argument to the contrary can be made. *See City of Edmonds*, 749 F.2d at 1421; *American Fed'n of Gov't Employees v. Federal Labor Relations Auth.*, 739 F.2d 87, 89 (2d Cir. 1984); *Manatee County v. Train*, 583 F.2d 179, 182 (5th Cir. 1978); *Association of Am. R.R. v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977). Thus, section 2201(v) requires that the DOE not offer enrichment of foreign uranium.

This requirement is, of course, subject to the modifying phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry." That phrase, however, is also unambiguous. It informs the DOE of the *amount* of restriction required; it does not provide a scenario in which the DOE is excused from restricting foreign enrichment notwithstanding a nonviable domestic industry. It instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable. If a less-than-100% restriction can assure viability, only that lesser level of restriction is required. The statute does not

provide that increasingly stiffer restrictions are required only to the point that DOE determines that such restrictions will not resuscitate the industry. Under its interpretation of the statute, the DOE has no discretion until that time, but once such a determination is made, it may lift *all* restrictions—at the precise point in time when the domestic industry is at its lowest ebb.

Furthermore, the nature of the modifying phrase here differs from *Young*. In *Young*, the FDA specifically argued that regulations were not required to protect the public health; rather, tolerance levels established by the FDA accomplished that goal. The FDA credibly argued that it could serve the statutory purpose—the protection of the public health—without publishing regulations for aflatoxin. In this case, the DOE cannot accomplish its statutory purpose—the maintenance of a viable domestic uranium industry—without imposing restrictions on enrichment of foreign uranium. Rather, the DOE proposes to abandon the statutory goal. The DOE does not argue that the domestic industry is viable without restrictions; it claims that it has discretion to determine whether to implement restrictions when restrictions will not assure the viability of the domestic industry. The DOE's interpretation strains the plain meaning of section 2201(v). The unambiguous language of the statute requires the DOE to refuse enrichment of foreign uranium "to the extent necessary to assure" a viable domestic industry. The DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. It must continue to increase restrictions until the domestic industry becomes viable. The DOE's argment that this policy is not wise in the present uranium market should be made to Congress and not to the courts. We can only apply the statute as Congress passed it.



Finally, this is not a "rare and exceptional" case in which the language of the statute must give way to clear congressional intent. In hearings prior to the enactment of section 2201(v), consistent concern was expressed over the effects of imports on the domestic uranium industry. *See, e.g., Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. 114-15 (1963) (Statement of Richard D. Bokum II, President, United Nuclear Corp.), *id.* at 145 (statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO): *Private Ownership of Special Nuclear Materials, 1964: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong. 2d Sess. 154 (1964) (statement of Dean A. McGee, President, Kerr-McGee Oil Industries). In its report to Congress, the Joint Committee first recognized the importance of a viable domestic uranium industry:

> The maintenance of a viable domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital to the long-range defense and security interests of the United States. The bill accompanying this report, by providing for uranium enrichment services, is a desirable step in this direction.

8. Rep. No. 1325, 88th Cong., 2d Sess. ____, *reprinted in* 1964 U.S. Code Cong. & Admin. News 3105, 3115. The committee then explained the basis for requiring restrictions.

> [I]mportation could have a serious impact on the uranium mining and milling industry, particularly during a period of limited demand for its product. Accordingly, the flexible restrictions contained in the committee bill will allow the [DOE] to review periodically the condition of the domestic and world

> uranium markets and to offer enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium mining and milling industry.
>
> . . . .
>
> . . . [T]he committee . . . has concluded that it would be reasonable to place restrictions upon the performance of services by the [DOE] where the enrichment of foreign material would have an adverse effect on the domestic uranium industry. It is the committee's view that the measures taken in this bill to assure the viability of the domestic uranium industry are in the national interest since this industry is closely related to our vital defense and security interests.

*Id.* at ____, *reprinted in,* 1964 U.S. Code Cong. & Admin. News at 3120-21. At no point in the legislative history is there any indication that Congress would permit the DOE to abandon attempts to maintain a healthy domestic industry. On the contrary, Congress considered a viable domestic industry to be vitally important to United States defense and security interests and did not want the United States to become dependent on foreign sources of uranium. We conclude that the legislative history supports our determination that if the domestic uranium industry is not viable, the DOE must restrict enrichment of foreign uranium. Thus, we affirm the district court's decision granting plaintiffs' summary judgment motion on count four.

### III. Conclusion

Plaintiffs' challenge to the UESC is remanded to the district court. The record does not clearly demonstrate that plaintiffs have standing. However, the DOE did not challenge standing in the district court, and plaintiffs



should be given an opportunity to prove their standing allegations.

Plaintiffs' claim that section 2201(v) unambiguously requires the DOE to implement restrictions on enrichment of foreign uranium when the domestic uranium industry is not viable is correct. The DOE has not implemented such restrictions and, thus, the district court's decision granting plaintiff injunctive relief was appropriate and should be affirmed.

The case is affirmed in part and remanded in part, with instructions to proceed in a manner consistent with this opinion. The stay of the district court's injunction heretofore entered is dissolved.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 84-C-2315

WESTERN NUCLEAR, INC., ET AL., PLAINTIFFS

*v.*

F. CLARK HUFFMAN, ET AL., DEFENDANTS

[Filed June 20, 1986]

**ORDER**

CARRIGAN, J.

Oral argument was heard on June 5, 1986, on all pending motions in this case. The motions are directed to counts I, III, IV and V of the plaintiffs' complaint. Having heard the arguments of counsel with respect to the pending motions, having read the extensive briefs, and being fully advised, I hereby enter the following orders:

1. Plaintiffs' Motion for Summary Judgment with respect to Count I is granted and the defendants' Cross-motion for Summary Judgment with respect to Count I is denied. Defendants' request for a stay with respect to Count I is denied.

In light of the record, including affidavits submitted by the plaintiffs and *amici*, and including the information contained as part of the Secretary of Energy's determination in September 1985 that the domestic uranium industry was not viable, and in light of the Department of Energy's continuing refusal to recognize its obligations under 42



U.S.C. § 2201(v), I find that there is an immediate necessity for injunctive relief and therefore order as follows:

Given the Department of Energy's need to plan its implementation of the mandate of § 161(v) of the Atomic Energy Act, 42 U.S.C. § 2201(v), and pending the completion of the rule-making ordered herein: (a) the Department shall restrict its enrichment of source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States to twenty-five percent of such materials enriched over the time period June 6, 1986, to December 31, 1986; (b) as of January 1, 1987, and continuing until the viability of the domestic uranium industry is assured, the Department shall not offer or provide any enrichment services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

The Department shall commence administrative rule-making proceedings to establish criteria for providing enrichment services that shall comply with the mandate of 42 U.S.C. § 2201(v) to assure the maintenance of a viable domestic uranium industry. These criteria shall include the extent to which enrichment services may be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. If the Department believes that criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry, then the Department shall clearly articulate its reasons for such a position.

The court retains jurisdiction of this matter to assure compliance with this order.

2. With respect to the issues raised by Count III of the complaint, and the motions pending concerning Count III

of the complaint, the defendants' Motion for Stay is granted for ninety days.

3. With respect to Count IV of the complaint, the defendants' Motion to Dismiss is denied and the defendants' Motion for Stay is denied. The defendants' Motion for Summary Judgment with respect to Count IV is granted.

4. Upon motion of the plaintiffs, there being no objection from the defendants, the plaintiffs are granted leave to withdraw Count V of their complaint without prejudice.

Dated at Denver, Colorado, June 20, 1986.

BY THE COURT:

/s/ JIM R. CARRIGAN, JUDGE
Jim R. Carrigan, Judge
United States District Court



## APPENDIX C

[Excerpts from Transcript of June 5, 1986 Motions Hearing, United States District Court, District of Colorado].

THE COURT: Those are all—those are just policy arguments. I'm not a policy-making board or I'm not in Congress, I'm simply trying to figure out what the law says so I can follow it, that's what I'm sworn to do. To me it says that the agency, the Department of Energy, shall not offer such services for source or special nuclear materials of foreign origin—period. In effect, I don't see how there is any discretion in that language.

MS. CLIFFORD: Your Honor—

THE COURT: How could it be any clearer than saying "shall not offer?"

MS. CLIFFORD: Because, Your Honor, of the clause there which provides that there must be a determination that it will assure the maintenance of a viable domestic industry. Your Honor, we submit that the preliminary finding of the Department of Energy is that it will not.

* * * * *

[The Court] In any event, I conclude that the Atomic Energy Act does not preclude judicial review of that agency's actions or the present Department of Energy's actions. It appears to me that even if there were some discretion given to the agency here to determine whether or what measures ought to be taken, clearly this statute does not leave the discretion not to take any measures at all to assure the provision of a viable domestic industry. It seems to me clear from the Congressional history that Congress intended that—that its language operate as a mandate, and if it didn't so intend then it ought to be swiftly amended so that courts can understand that it didn't intend what its plain language says.

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